

STATE OF MICHIGAN
COURT OF APPEALS

LINDSAY LUKAVSKY,

Plaintiff-Appellant,

v

EDWARD W. SPARROW HOSPITAL
ASSOCIATION, SPARROW HEALTH SYSTEM,
and JARRED K. HOLD, D.O.,

Defendants-Appellees.

UNPUBLISHED

October 19, 2023

No. 361311

Ingham Circuit Court

LC No. 21-000378-NH

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

REDFORD, J. (*concurring*).

I concur in the result because we are bound by *Carter v DTN Mgt Co*, ___ Mich App ___, ___; ___NW2d ___ (2023). For the reasons explained in *Campagner v Burch*, ___ Mich App ___, ___; ___NW2d ___ (2023), I do not believe that our Supreme Court had the constitutional authority to issue administrative orders that interfere with the running of Legislatively defined statutory limitations periods. But for *Carter*, I would affirm the trial court’s decision. This case demonstrates why *Carter*’s interpretation and application of our Supreme Court’s March 23, 2020 Administrative Order No. 2020-3, 505 Mich cxxvii (2020) (AO 2020-3) is wrong. The period of limitations for medical malpractice actions is controlled by statute. *Miller v Mercy Mem Hosp Corp*, 466 Mich 196, 199; 644 NW2d 730 (2002). The limitations period for a malpractice action is two years. MCL 600.5805(8). A medical malpractice claim “accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.” MCL 600.5838a(1). A medical malpractice action that is not commenced within the statutorily prescribed time limits is time-barred. MCL 600.5838a(2).

Plaintiff’s cause of action for medical malpractice accrued on November 27, 2018. November 27, 2020, therefore, is the date on which the applicable 2-year statute of limitations under MCL 600.5805(8) would have expired. Recognizing that deadline, plaintiff gave defendants notice of her intent (NOI) to file her medical malpractice action on November 25, 2020. Under MCL 600.5856(c), the giving of notice tolled the limitations period. The 182-day NOI period

under MCL 600.2912b ran from November 25, 2020, and elapsed on May 27, 2021. Plaintiff had two days remaining of the statutory limitations period following expiration of the NOI period to file her complaint, i.e., by May 29, 2021. Plaintiff, however, filed her complaint on June 2, 2021. Plaintiff's filing of her complaint would have been time-barred but for *Carter*. With *Carter*, plaintiff can add an additional 102 days simply because her statutory limitations period overlapped the period of AO 2020-3's operation.

Even supposing that our Supreme Court had authority to suspend the running of statutory limitations periods because of the COVID-19 epidemic state of emergency, applying *Carter*'s interpretation of AO 2020-3 to this case makes no sense. Here, all relevant deadlines by which plaintiff had to act, fell well outside the 102-day period during which AO 2020-3 existed and also months after our Supreme Court rescinded that administrative order by Administrative Order No. 2020-18, 505 Mich clviii (2020) (AO 2020-18), effective June 20, 2020.

In my estimation, the 102-day suspension of deadlines should have no impact on this case nor interfere with the running of the statutory limitations period simply because it overlapped the period during which AO 2020-3 was operative.

In *Moll v Abbott Labs*, 441 Mich 1, 23; 506 NW2d 816 (1993), our Supreme Court explained the Legislature's purpose in adopting statutes of limitations:

They encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they afford security against stale demands when the circumstances would be unfavorable to a just examination and decision; they relieve defendants of the prolonged fear of litigation; they prevent fraudulent claims from being asserted; and they remedy . . . the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert. [Quotation marks and citation omitted, alteration in original.]

Our Supreme Court observed that statutes of limitations express the clear intent of the Legislature to promote prompt resolution of claims. *Id.* at 20. "The law imposes on a plaintiff, armed with knowledge of an injury and its cause, a duty to diligently pursue the resulting legal claim." *Id.* at 29.

In this case, plaintiff knew of her claim and the applicable limitations period during which she had ample time and opportunity to diligently pursue it. The date on which her statutory limitations period would expire and by which she could submit her NOI occurred well after AO 2020-3 had come and gone. According to *Carter*'s interpretation and application of AO 2020-3, all litigants in civil matters get 102 days added to the applicable statutory limitations period if their cause of action accrued before the imposition of the suspension of filing deadlines under AO 2020-3. The plain language of AO 2020-3, however, stated that it "intended to extend all *deadlines* pertaining to case initiation . . . in civil . . . matters *during the state of emergency* declared by the Governor related to COVID-19." AO 2020-3 (emphasis added). The plain language of AO 2020-3 indicates that the order applied to deadlines for initial filing of pleadings or motions, objections

to pleadings, and “any day *that falls during the state of emergency* declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).” AO 2020-3 (emphasis added).¹

None of the deadlines pertaining to initiation of this civil matter fell within the period of the state of emergency. Consequently, nothing necessitated nor justified suspension of the running of the limitations period and tacking on another 102 days simply because it ran while the state of emergency existed. Accordingly, providing a 102-day extension to the statutory limitations period in this case makes no sense.² Therefore, but for *Carter*, I would affirm the trial court’s decision.

/s/ James Robert Redford

¹ In *Armijo v Bronson Methodist Hosp*, ___ Mich App ___, ___; ___ NW2d ___ (2023), slip op at 7, this Court concluded that “the administrative orders by their language only applied to deadlines which took place during the state of emergency[.]” The Court in *Carter*, however, considered the same language and interpreted AO 2020-3’s statement regarding *deadlines* that “*fall during the state of emergency*” to mean that the suspension applied to all statutory limitations periods that started before, ran during, and ran after the termination of the state of emergency. *Armijo*’s reading is more faithful to the plain language of AO 2020-3 and should control, particularly in a case such as the one at bar where no deadline fell during the state of emergency.

² Our Supreme Court entered its administrative orders based on the state of emergency declared by the Governor. In *In re Certified Questions from US Dist Ct, W Dist of Mich*, 506 Mich 332, 337-338; 958 NW2d 1 (2020), however, the Court held:

first, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA), MCL 30.401 *et seq.*, to declare a “state of emergency” or “state of disaster” based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq.*, because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law.

As stated by the Supreme Court, the Governor lacked the constitutional authority to issue executive orders beyond the short term permitted under the EMA and could not extend them to declare a “state of emergency” or “state of disaster” based on the COVID-19 pandemic after April 30, 2020. Since this is so, how can the Court’s administrative orders based on acts of the Governor’s which our Supreme Court later concluded she did not have the authority to issue serve to toll all statutory limitations periods for 102 days irrespective of when such limitations periods began to run and regardless of whether their deadlines fell within such declared state of emergency?